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In the Supreme Court of the United States

OCTOBER TERM, 1995

BROTHERHOOD OF LOCOMOTIVE ENGINEERS, ET AL.,
PETITIONERS

v.

ATCHISON, TOPEKA AND SANTA FE RAILWAY CO., ET AL.

CORRECTED COPY

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS

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QUESTION PRESENTED

Whether time spent by members of a train crew waiting for transportation to their point of final release is counted as "time on duty" under the Hours of Service Act, 49 U.S.C. 21101 *et seq.*

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OPINIONS BELOW

The opinion of the en banc court of appeals (Pet. App. 1a-20a) is reported at 44 F.3d 437. The opinion of the court of appeals panel (Pet. App. 21a-28a) is reported at 29 F.3d 324.

JURISDICTION

The final judgment of the court of appeals, following its en banc rehearing, was entered on December 29, 1994. J.A. 19, 36, 52. The petition for a writ of certiorari was filed on March 28, 1995, and was granted on

June 19, 1995 (115 S. Ct. 2575). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATEMENT

1. The Hours of Service Act (HSA)[1] is designed to foster railroad safety, by limiting the number of hours that any member of a train crew may remain on duty and by specifying periods of off-duty time that crew members must be given before they may return to work. Thus, as a general matter,

> a railroad carrier and its officers and agents may not require or allow a train employee to remain or go on duty—

[1] At the time this suit was commenced, the Hours of Service Act was codified at 45 U.S.C. 61 *et seq.* (1988 & Supp. V 1993). During the pendency of the present action, Congress repealed those provisions of the United States Code as part of a broad recodification of federal transportation laws. See Act of July 5, 1994, Pub. L. No. 103-272, 108 Stat. 745. The repeals effected by the recodification do not apply, however, to "proceedings that were begun before the date of enactment of this Act." Pub. L. No. 103-272, § 7(b), 108 Stat. 1379. Congress also made clear that the recodification is intended to make no substantive changes in the affected laws, although it alters their arrangement and language in certain respects. See Pub. L. No. 103-272, § 6(a), 108 Stat. 1378; H.R. Rep. No. 180, 103d Cong., 1st Sess. 1-5 (1993). Pursuant to Pub. L. No. 103-272, the provisions of the HSA are now codified chiefly in Chapter 211 of Title 49 of the United States Code. See 49 U.S.C. 21101-21108. Other HSA provisions are codified at 49 U.S.C. 20102, 21303, and 21304. The provision of pivotal importance to the present action—45 U.S.C. 61(b)(3) (1988), which defined "time on duty"—is now codified at 49 U.S.C. 21103(b). Sections 21101-21107 and 21303 are reproduced as an appendix to this brief. We will refer herein (as petitioners have) to the pertinent provisions as recodified.

> (1) unless that employee has had at least 8 consecutive hours off duty during the prior 24 hours; or
>
> (2) after that employee has been on duty for 12 consecutive hours, until that employee has had at least 10 consecutive hours off duty.

49 U.S.C. 21103(a) (App., *infra*, 2a).[2] The present case concerns the appropriate treatment of time spent waiting for "deadhead transportation"[3] at the conclusion of an employee's period of service.[4] Such

[2] The statutory limitations on hours of service do not apply to a situation involving "a casualty," "an unavoidable accident," "an act of God," or "a delay resulting from a cause unknown and unforeseeable to a railroad carrier or its officer or agent in charge of the employee when the employee left a terminal." 49 U.S.C. 21102(a)(1)-(4) (see App., *infra*, 1a-2a). The HSA also provides that "[a] train employee on the crew of a wreck or relief train may be allowed to remain or go on duty for not more than 4 additional hours in any period of 24 consecutive hours when an emergency exists and the work of the crew is related to the emergency." 49 U.S.C. 21103(c) (App., *infra*, 4a).

[3] "Deadhead transportation" is transportation to or from a duty assignment, not including normal commuting time.

[4] 49 U.S.C. 21103 (App., *infra*, 2a-4a) applies to "train employee[s]," defined by the HSA as individuals "engaged in or connected with the movement of a train, including a hostler." 49 U.S.C. 21101(5) (App., *infra*, 1a). The HSA establishes similar requirements concerning the on- and off-duty hours of "signal employees," see 49 U.S.C. 21104 (App., *infra*, 4a-6a), and "dispatching service employees," see 49 U.S.C. 21105 (App., *infra*, 6a-7a). The statutory provision governing "deadhead transportation" (49 U.S.C. 21103(b)(4) (App., *infra*, 3a)), however, applies only to "train employees" and has no analogue in Sections 21104 and 21105, since only employees engaged in or

waiting time may occur when a train crew "expires" —*i.e.*, reaches the end of the time period during which it may remain on duty—before the train and crew reach their scheduled destination. In such instances, the Act requires that the crew cease operating the train, so the train must be stopped if there is no replacement crew present. The expired crew may then be required to wait, either on the train or elsewhere, for the arrival of a relief crew and for a means of transportation to the place of the expired crew's final release. See Pet. App. 3a.

As originally enacted in 1907, and continuing until its amendment in 1969, the HSA implicitly divided all employee time into two categories—"on duty" and "off duty"—but provided no express statutory definition of either term. See 45 U.S.C. 61 *et seq.* (1964). Early judicial decisions held as a general matter that interim periods of inactivity at the work site during which employees awaited further instructions were properly regarded as "on duty" time, but that time spent in deadhead transportation, both to and from the work site, was "off duty" time. See, *e.g.*, *Missouri, K. & T. Ry.* v. *United States*, 231 U.S. 112, 119 (1913); *United States* v. *Great Northern Ry.*, 285 F. 152 (9th Cir. 1922). There appears, however, to have been no clearly established answer to the question now at issue, regarding the proper characterization of time spent waiting for deadhead transportation from a duty assignment. Although the railroads have offered anecdotal evidence that such time was treated as "off duty" time during that period (C.A. App. 68-69), the only reported judicial decision addressing the question concluded that the particular waiting time at issue in that case should be considered time on duty. See *United States* v. *Pennsylvania R.R.*, 275 F. Supp. 345 (W.D. Pa. 1967).

connected with the movement of a train can be expected to utilize deadhead transportation.

Congress substantially amended the HSA in 1969, reducing the number of permissible hours on duty and providing, for the first time, a definition of "on duty" time. See 45 U.S.C. 61(b)(3) (1988). Congress dealt specifically with the issue of deadhead transportation time, adopting a compromise position between those advocated by union and industry groups. By virtue of that amendment, the Act in its current form provides that "[t]ime spent in deadhead transportation *to* a duty assignment is time on duty." 49 U.S.C. 21103(b)(4) (App., *infra*, 3a) (emphasis added). The Act further provides that "time spent in deadhead transportation *from* a duty assignment to the place of final release is neither time on duty nor time off duty." *Ibid.* (emphasis added). That provision effectively creates a third category of time, commonly known as "limbo time." Limbo time does not count as on-duty time subject to the specified statutory maximum of on-duty hours during any one period of service, but it also does not count toward the statutory minimum of off-duty rest time that a crew member must be given prior to the beginning of the next period of service. See Pet. App. 3a-4a.[5]

[5] The House Report on the 1969 amendments explains:

> Time on duty was originally proposed, among other things, to include time spent in deadhead transportation to and from a duty assignment. The bill as reported provides that only time spent in deadhead transportation to a duty assignment should be considered as time on duty. However, the reported bill provides that time spent in dead-

The Federal Railroad Administration (FRA) in the Department of Transportation is responsible for enforcing the HSA.[6] Subsequent to the 1969 amendments, and continuing until 1992, the FRA took the position that, when a crew member is relieved of all responsibilities but is required to await the arrival of deadhead transportation to his or her point of final release, the time spent waiting should be considered limbo time. See Pet. App. 34a-41a (letter from FRA Assistant Chief Counsel Gregory B. McBride to counsel for the present petitioners (Aug. 4, 1989)). The FRA took the position that such waiting time "most closely resembles, and is part and parcel of, deadheading from duty." *Id.* at 35a. As the agency explained, such time cannot be considered off-duty time, because it does not afford a true opportunity for rest; yet there is little or no safety rationale for considering such time to be part of time on duty, as long as the crew member has no duties to perform. *Id.* at 37a. The FRA made clear, however, that the time spent waiting would be considered time on duty if the

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head transportation from a duty assignment to his point of final release shall not be counted in the 10 or 8 (as the case may be) consecutive hours off duty.

H.R. Rep. No. 469, 91st Cong., 1st Sess. 7-8 (1969) (*1969 House Report*).

[6] The Secretary of Transportation may impose a civil penalty of "at least $500 but not more than $10,000" for each violation of the Act. 49 U.S.C. 21303(a)(2) (App., *infra*, 9a). A penalty of up to $20,000 may be imposed for a grossly negligent violation, a pattern of repeated violations causing an imminent hazard of death or injury, or a violation that actually results in death or injury. *Ibid.* Civil penalties may be collected through actions brought by the Attorney General in federal district court. 49 U.S.C. 21303(b) (App., *infra*, 9a).

crew member was required to perform any service for the railroad. *Id.* at 37a-40a.

2. In 1990, petitioners Brotherhood of Locomotive Engineers (BLE) and United Transportation Union (UTU) filed lawsuits in Oregon and California challenging the FRA's interpretation of the HSA on this issue. On appeal, the United States Court of Appeals for the Ninth Circuit consolidated the two cases for decision, which it rendered in September 1992. *United Transportation Union* v. *Skinner*, 975 F.2d 1421 (*UTU*). The Ninth Circuit held that the waiting time at issue must be counted as "time on duty" under the HSA, believing it was "clear" that that result obtained prior to the 1969 HSA amendments and that those amendments evinced no congressional intent to alter the law on this point. See *id.* at 1426-1427. The court of appeals also expressed the view that crew members awaiting deadhead transportation may face "contingent responsibilities," in that they "may be required to provide certain additional services for the railroad, should the need for any of those services arise." *Id.* at 1423, 1428.

The government did not seek review in this Court of the *UTU* decision, which was the first appellate ruling on the issue. The FRA undertook to re-evaluate its approach to the question, however, and the agency determined that it would apply the Ninth Circuit's interpretation of the HSA on a nationwide basis. That shift in policy was announced in an October 28, 1992, letter from FRA Chief Counsel S. Mark Lindsey to Robert W. Blanchette, Vice Pres-

ident of the Association of American Railroads (J.A. 73-77), and was later explained in a notice published in the *Federal Register*. 58 Fed. Reg. 18,163 (1993) (J.A. 158-167).

In the *Federal Register* notice, the FRA stated that it did not agree with the legal rationale of the Ninth Circuit. See J.A. 160. The FRA recognized, however, that the text of the HSA does not provide an unambiguous characterization of time spent awaiting deadhead transportation, and stated that "the issue has always been a close one." *Ibid.* The FRA noted that application of the stricter interpretation adopted by the Ninth Circuit could contribute to rail safety, insofar as it could reduce the number of lengthy waits for deadhead transportation, which in turn can contribute to the problem of cumulative fatigue from irregular work schedules. J.A. 161-162. The FRA also observed that its experience in Oregon (where an injunction mandating the stricter approach had been in effect for more than a year) had allayed any concerns that this approach might induce railroads to keep "expired" crews working beyond the statutory limit, thereby disserving the safety purposes of the Act. J.A. 160-161. As the FRA has subsequently made clear, however, its primary rationale for adopting the Ninth Circuit's interpretation was simply to ensure "uniform application of the Act" to railroads operating in various parts of the nation. J.A. 162; see Pet. App. 30a.

3. In 1993, nine major railroads initiated the present action, seeking direct review in the United States Court of Appeals for the Seventh Circuit of the FRA's new policy, as announced in the *Federal Register* notice and in two other communications.[7] Initially, a divided panel of that court upheld the FRA's action. Pet. App. 21a-28a. The panel majority decided that the agency's position was "reasonable and based upon a permissible construction of the HSA" and stated that it "would be hard pressed to say that an agency's reliance upon the opinion of a Circuit Court of Appeals is unreasonable." *Id.* at 26a. One judge dissented, concluding that the agency's revised interpretation of the HSA was not reasonable. *Id.* at 27a-28a.

The respondent railroads sought rehearing en banc, which the court of appeals granted. Following reargument, the en banc court unanimously ruled in the railroads' favor. Pet. App. 1a-20a. A majority of the en banc court concluded, as a preliminary matter, that the FRA's interpretation was not entitled to substantial deference, in light of the history of the agency's treatment of the issue, including the purported inconsistency of the FRA's legal positions. *Id.* at 7a-10a. The majority went on to hold that, in any event, "the statute itself resolves this issue quite clearly." *Id.* at 10a. Under the HSA, the majority observed, time spent in deadhead transportation from the train to the point of final release is not treated as time on duty (because fatigue at that point poses no

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[7] The respondent railroads filed separate petitions for review of the *Federal Register* notice, an earlier FRA memorandum stating the agency's position on the issue, and the FRA's subsequent letter denying the railroads' Petition for Interpretation of the Hours of Service Act, which the FRA treated as a petition for rulemaking. See J.A. 92-96, 168-173, 181-186. The Seventh Circuit consolidated the three petitions and ruled, in its en banc opinion, that the FRA's interpretation constitutes "final agency action[]" reviewable under 28 U.S.C. 2342(7) (Supp. V 1993). Pet. App. 5a-6a.

immediate danger) but is also not treated as time off duty (because it does not afford any genuine opportunity for rest). *Id.* at 12a. The majority concluded that time spent awaiting the arrival of a deadhead vehicle after completion of operating responsibilities should similarly be counted as "limbo time" because the very same considerations apply to it. *Ibid.*

Three concurring judges took issue with the majority's comments about the FRA's purported inconsistency, noting that the agency had in fact adhered consistently to two distinct principles: (1) that the better interpretation of the HSA is to treat the sort of waiting time at issue here as limbo time; and (2) that there is a substantial need for national uniformity in applying the HSA, "given the integrated nature of the national railroad system." Pet. App. 17a. The concurring judges concluded, however, that the FRA's policy decision in 1992 to favor the value of uniformity (and accordingly to acquiesce in the Ninth Circuit's ruling in *UTU*) was not the sort of agency decision to which a court owes deference. *Id.* at 19a-20a.

4. In light of the en banc decision in the present case, the FRA has again reevaluated its position. In a March 1, 1995, letter to Robert W. Blanchette of the Association of American Railroads, FRA Chief Counsel S. Mark Lindsey stated that, in all parts of the nation outside the Ninth Circuit, the agency would revert to its prior view that time during which an employee is "merely required to remain on a train" awaiting deadhead transportation "most closely resembles, and is part and parcel of, deadheading from duty," and would therefore be treated as limbo time. Pet. App. 31a. The Chief Counsel's letter observed that the FRA had "adopted the Ninth Circuit's

interpretation primarily to achieve national uniformity," but that the Seventh Circuit's ruling "has now made this goal impossible to achieve unless and until the United States Supreme Court resolves the split between the circuit courts." *Id.* at 30a. At the same time, the FRA emphasized—consistent with its earlier pronouncements—that, "if an employee is required to perform service of any kind during that period * * *, he or she will be considered as on duty until all such service is completed." *Id.* at 31a. The FRA also indicated that it would continue, pending the possible resolution of the issue by this Court, to adhere to the *UTU* ruling within the States constituting the Ninth Circuit. *Id.* at 32a.[8]

SUMMARY OF ARGUMENT

A. Time spent waiting for the deadhead vehicle at the conclusion of a duty assignment is properly characterized as "part and parcel" of deadhead transportation, and thus as "limbo time." The term "transportation" may naturally be understood to encompass

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[8] A number of railroads—*i.e.*, those that were petitioners below in the present case, and that operate within the Ninth Circuit—have instituted a new action seeking review of the FRA's March 1, 1995, announcement insofar as it reflects the agency's decision to continue applying the Ninth Circuit's rule within that Circuit. *Atchison, T. & S.F. Ry.* v. *Peña*, No. 95-1238 (D.C. Cir., filed Apr. 28, 1995). Relying on *United States* v. *Stauffer Chemical Co.*, 464 U.S. 165, 169-172 (1984), the railroads contend that, under the doctrine of mutual collateral estoppel, the FRA is required to abide by the Seventh Circuit's decision even within the Ninth Circuit, with respect to railroads that were parties to the present litigation. All proceedings in that action are being held in abeyance, however, pending this Court's disposition of the instant case. See Order, No. 95-1238 (D.C. Cir. July 17, 1995).

incidental activities that do not themselves involve movement but that are prerequisites to its occurrence, such as awaiting the arrival of a vehicle. That reading is strongly supported by the policies underlying the Hours of Service Act. Time spent in deadhead transportation from a duty assignment is not time on duty because the worker's fatigue during that period poses no danger to himself or others. It is not time off duty because the employee is unlikely to have a meaningful opportunity for rest. Because those considerations apply with equal force to time spent waiting for the deadhead vehicle, that waiting period should similarly be treated as limbo time. That reading is supported by the pertinent Senate Report, which makes clear that time spent in deadhead transportation *to* a duty assignment includes time spent waiting for the deadhead vehicle.

B. Petitioners make little effort to explain why the waiting time at issue here does not fall within "time spent in deadhead transportation." They argue instead that such waiting periods are covered by other provisions of the HSA, which define the scope of "time on duty." Those arguments are without merit. The statutory provisions on which petitioners rely are inapplicable by their terms to the waiting periods at issue. But even if this waiting time appeared to fall simultaneously within two statutory provisions—one defining it as time on duty, and the other defining it as neither time on duty nor time off duty—consideration of the structure and purposes of the HSA would be appropriate to resolve the anomaly. Because no threat to railroad safety is created when employees are required to wait for the deadhead vehicle after a 12-hour period of service, treatment of

the waiting period as neither on- nor off-duty time best effectuates the policies of the Act.

C. Petitioners place substantial reliance on the legislative history of the 1969 amendments to the HSA. In our view, the legislative history offers no support to petitioners' position. The hearing testimony upon which petitioners rely did not address the question presented in this case, either directly or by logical implication. Prior to 1969 there was no clearly established rule treating the waiting periods at issue here as time on duty; and, in any event, Congress manifestly sought to change the legal status of time spent in deadhead transportation at the conclusion of a duty assignment.

D. Finally, the FRA's construction of the pertinent statutory provisions is entitled to deference if this Court finds those provisions ambiguous. The agency has consistently recognized that the time at issue is most persuasively characterized as part of deadhead transportation, and thus as limbo time. Its decision to acquiesce in the Ninth Circuit's *UTU* ruling on a nationwide basis was expressly grounded in its desire for uniform application of the Act. After the Seventh Circuit's en banc decision, however, it was apparent that no such uniformity could be achieved absent intervention by Congress or this Court. The agency therefore reverted (in States outside the Ninth Circuit) to the position that it had consistently espoused prior to the *UTU* decision. The FRA's efforts to adapt its policies to a changing legal landscape hardly constitute the sort of unexplained inconsistency that might render judicial deference unwarranted.

ARGUMENT

TIME SPENT BY A TRAIN EMPLOYEE WAITING FOR A VEHICLE TO TAKE THE EMPLOYEE FROM HIS OR HER FINAL DUTY ASSIGNMENT TO THE PLACE OF FINAL RELEASE IS NOT TIME ON DUTY UNDER THE HOURS OF SERVICE ACT

A. The Text, Purpose, And History Of The HSA Support The Conclusion That Time Spent Waiting For The Deadhead Vehicle Is "Part And Parcel" Of "Time Spent In Deadhead Transportation," And Thus Is "Limbo Time"

Prior to the 1969 amendments to the Hours of Service Act, all deadheading time, both to and from duty, was generally considered to be off-duty time. See, *e.g.*, *Missouri, K. & T. Ry.* v. *United States*, 231 U.S. 112, 119 (1913); S. Rep. No. 604, 91st Cong., 1st Sess. 7 (1969) (*1969 Senate Report*) (noting that, under the pre-1969 Act, an employee's off-duty time "might not be time for rest but could include appreciable time the employee spent in deadheading back from the place where he was released from time on duty"). Congress altered that rule in 1969, adopting a carefully tailored provision under which time spent in deadhead transportation *to* a duty assignment is counted as time on duty, but time spent in deadhead transportation *from* a duty assignment to the place of final release is counted as neither on-duty nor off-duty time—*i.e.*, as "limbo time." See 49 U.S.C. 21103(b)(4) (App., *infra*, 3a). If, as the FRA has concluded, time spent waiting for a deadhead vehicle is indeed "part and parcel" of deadhead transportation

(Pet. App. 31a),[9] then the proper categorization of such waiting time is clear: it is limbo time, pursuant to the express language of Section 21103(b)(4).[10] The agency's position is consistent with the text of the HSA and with its purpose and history.[11]

1. Although the term "transportation" connotes motion, it may naturally be understood to encompass incidental activities that do not themselves involve movement but that are prerequisites to its occurrence, such as awaiting the arrival of a vehicle. For example, if airline regulations required passengers to

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[9] That was the FRA's long-standing position prior to the Ninth Circuit's 1992 ruling in *UTU*, see Pet. App. 37a, and it is the FRA's position now.

[10] If, on the other hand, such waiting time is *not* part of deadhead transportation, its proper categorization would be somewhat more problematic. In the court below, the FRA took the position that, assuming such time not to be part of deadheading, it was best categorized as a form of "commingled service" to the railroads, and thus as time on duty under 49 U.S.C. 21103(b)(3) (App., *infra*, 3a). See U.S. C.A. Br. 20-21. The intervening unions invoked both the commingled service provision and those regarding interim rest periods as bases for categorizing that type of waiting period as time on duty. Union C.A. Br. 7, 9. The railroads, as an alternative to their principal argument that such waiting time is part of deadheading, suggested that it might be considered time off duty—a result which, even if it could be textually supported, would lead to the bizarre result that a crew could be placed back in service if its wait for deadhead transportation amounted to ten hours or more.

[11] The Hours of Service Act contains no provisions regulating the pay or other financial benefits that must be provided to railroad employees. Thus, resolution of the question whether the waiting periods at issue here are limbo time rather than on-duty time will not determine any question concerning compensation for those periods.

arrive at the gate 30 minutes prior to takeoff, that half hour could readily be characterized as part of a passenger's "travel time." Similarly, an attorney who telephones her office during a layover in Cincinnati might quite naturally state that she is "in transit" or "en route" from Washington to Los Angeles. By the same token, the sort of waiting time at issue here may reasonably be regarded as part of deadhead transportation. If, for example, crew members are instructed at midnight to stop the train and wait for the arrival of a van to take them to their lodging, and if the van picks them up at 1:30 a.m. and drops them at their designated terminal at 4:00 a.m., it would be altogether natural for a crew member to say that he had spent four hours "in deadhead transportation to [his] place of final release."

2. In determining whether waiting time is included within "time spent in deadhead transportation," the Court should not view that phrase in isolation but should consider it in context, looking "to the provisions of the whole law, and to its object and policy." *United States Nat'l Bank of Oregon* v. *Independent Ins. Agents of America, Inc.*, 113 S. Ct. 2173, 2182 (1993) (quoting *United States* v. *Heirs of Boisdoré*, 49 U.S. (8 How.) 113, 122 (1849)); see *K Mart Corp.* v. *Cartier, Inc.*, 486 U.S. 281, 291 (1988) ("In ascertaining the plain meaning of the statute, the court must look to the particular statutory language at issue, as well as the language and design of the statute as a whole."). In the present case, the logic as well as the literal language of Section 21103(b)(4) supports the FRA's conclusion that time spent waiting for the deadhead vehicle is "part and parcel" of deadhead transportation. Pet. App. 31a.

The overriding purpose of the HSA is "to promote safety in operating trains by preventing the excessive mental and physical strain which usually results from remaining too long at an exacting task." *Chicago & A.R.R.* v. *United States*, 247 U.S. 197, 199-200 (1918). To achieve that result, the HSA provides that (1) with rare exceptions (see note 2, *supra*), railroad workers may not remain on duty for more than 12 consecutive hours, and (2) railroad employees must be given an adequate opportunity for rest before beginning the next period of service.[12] As the court of

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[12] The HSA also reflects Congress's determination that even periods of inactivity may increase a worker's level of fatigue unless the length and location of those periods is such that the worker is afforded a genuine opportunity to rest and recuperate. Thus, "interim period[s] available for rest" are generally treated as time on duty unless they extend for four hours or more and occur at a designated terminal. 49 U.S.C. 21103(b)(5) and (6) (App., *infra*, 3a); see pages 20-21, *infra*. The HSA also provides that "[t]ime spent in deadhead transportation to a duty assignment is time on duty." 49 U.S.C. 21103(b)(4) (App., *infra*, 3a).

The distinct ways in which Congress dealt with deadheading to and from train duty mirror the statutory purpose in a direct, commonsense manner. A worker who spends six hours in deadhead transportation and then works on train operation for 12 hours may be seriously fatigued. That situation directly implicates the policies of the HSA, since the worker may be required to perform safety-sensitive tasks as much as 18 hours after he reported for duty. When deadhead transportation *follows* the period of service, however, the worker may be similarly fatigued by the end of 18 hours, but his fatigue poses no danger because it occurs *after* the period during which he is responsible for train operation. The HSA accordingly prohibits the former scenario (by classifying the initial six hours as time on duty) but permits the latter—while further providing that the mandatory period of off-duty time, which is intended to

appeals recognized, time spent in deadhead transportation from a duty assignment "is not on-duty time because the employee has no more operational responsibilities and this time, therefore, does not implicate railroad safety.[13] * * * [I]t is not off-duty time because the employee receives no legitimate opportunity to rest." Pet. App. 12a. Because those considerations apply with equal force to time spent waiting for the deadhead vehicle, treatment of that time as "part and parcel" of deadhead transportation effectuates the purposes of the HSA.[14]

3. The committee reports on the 1969 HSA amendments—which first added the provision dealing with deadhead time to and from duty assignments—do not

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ensure an adequate opportunity for rest, does not commence until after the deadhead transportation is completed.

[13] See 49 U.S.C. 21103(b)(2) and (3) (App., *infra*, 3a) (providing that time the employee "is engaged in or connected with the movement of a train," as well as time spent "performing any other service for the railroad" during a 24-hour period in which the employee is engaged in or connected with the movement of a train, is "time on duty").

[14] Suppose that a crew stops a train and ceases all operating duties at midnight, waits for a deadhead vehicle until 2:00 a.m., and arrives at its home terminal at 4:00 a.m. In terms of the purposes of the HSA, there is no difference between the first two hours and the second two hours. Regardless of whether the crew is awaiting arrival of the deadhead vehicle or is riding home in that vehicle, two pertinent conditions obtain: first, there is no immediate danger despite the crew members' fatigue, because they have no operating responsibilities; second, the crew members are afforded no genuine opportunity for rest. Accordingly, the purposes of the statutory scheme are fully effectuated by treating time spent waiting for arrival of the deadhead vehicle as part of "time spent in deadhead transportation," and thus as limbo time.

directly address the proper characterization of time spent awaiting a vehicle for deadhead transportation from a duty assignment to the employee's place of final release. The Senate Report does state, however, that time spent in deadhead transportation *to* a duty assignment is to be "calculated from the time [the employee] *reports for duty* until he reaches his duty assignment." *1969 Senate Report* 8 (emphasis added). That statement presumes that, where a gap exists between the time when the employee reports for duty and the time when the deadhead vehicle is ready for departure, such waiting time is part of "time spent in deadhead transportation" to a duty assignment. 49 U.S.C. 21103(b)(4) (App., *infra*, 3a). Although the legislative history contains no similar discussion regarding deadhead transportation *from* a duty assignment, such a discussion is hardly necessary. This Court has consistently recognized that, "[p]resumptively, 'identical words used in different parts of the same act are intended to have the same meaning.'" *United States Nat'l Bank*, 113 S. Ct. at 2185 (quoting *Commissioner* v. *Keystone Consol. Indus., Inc.*, 113 S. Ct. 2006, 2011 (1993)). Where, as here, the same phrase ("time spent in deadhead transportation") is repeated within a single statutory subsection, it would be odd indeed if it had different meanings in the two clauses.

B. Time Spent Waiting For The Deadhead Vehicle After Completion Of A Duty Assignment Does Not Fall Within The HSA's Definition Of "Time On Duty"

Apart from the bald assertion (Pet. Br. 15) that the phrase "time spent in deadhead transportation" in 49 U.S.C. 21103(b)(4) (App., *infra*, 3a) does not encompass

time awaiting arrival of the deadhead vehicle, petitioners make no effort to counter the foregoing analysis. Rather, relying on several other paragraphs of Section 21103(b), they contend that the waiting time at issue here cannot be considered limbo time because it falls within the statutory rules for determining what constitutes "time on duty." Petitioners' argument is without merit.

1. Petitioners assert (Pet. Br. 13-14) that time spent waiting for deadhead transportation constitutes an "interim period available for rest" that is deemed to be time on duty under 49 U.S.C. 21103(b)(5) or (6) (App., *infra*, 3a).[15] The period of time at issue here, however, is not an "interim" rest period, because it occurs after a crew member's operating duties have been completed rather than between periods of service to the railroad. Sections 21103(b)(5) and (6) reflect Congress's recognition that, when periods of inactivity are (by reason of their length or their location) insufficient to break a worker's continuity of service, the worker may (when he resumes his duties after the "interim" period) be no less fatigued than if he had received no respite at all.[16] That

[15] Those subsections provide that any interim period available for rest at a place other than a designated terminal is time on duty (49 U.S.C. 21103(b)(5) (App., *infra*, 3a)), and that even such a period at a designated terminal is time on duty unless it is at least four hours long (49 U.S.C. 21103(b)(6) (App., *infra*, 3a)).

[16] The Senate Report notes that "[i]nherent in the calculation of whether an employee is on duty is that of whether the interim periods provided for his rest are such and at such places as to provide the employee with the proper opportunities and facilities for rest and relaxation from the duties of his occupation." *1969 Senate Report* 7. The Report also observes that prior judicial decisions had "not established a minimum period of release which would constitute a bona fide break in continuity of service." *Ibid.* The question whether a particular rest period constitutes a sufficient "break in continuity of service" is relevant only if the rest period is both preceded and followed by periods of service to the railroad.

insight simply has no relevance to the waiting time at issue here, because the worker's fatigue following the completion of his duties presents no danger to himself or others. Cf. note 12, *supra*.[17]

2. Petitioners' reliance (Pet. Br. 15) on 49 U.S.C. 21103(b)(3) (App., *infra*, 3a) is also without merit. Section 21103(b)(3) provides that "[t]ime spent performing any other service for the railroad carrier during a 24-hour period in which the employee is engaged in or connected with the movement of a train

[17] Even if the waiting time at issue here were thought to fall within the terms of Section 21103(b)(5) or (6), it would not follow that it must be regarded as time on duty. As explained above, the waiting time here is properly regarded as "time spent in deadhead transportation from a duty assignment to the place of final release," a category that the HSA identifies as "neither time on duty nor time off duty." 49 U.S.C. 21103(b)(4) (App., *infra*, 3a). If the waiting period appeared to be covered by two distinct statutory provisions stating that the time in question was to be characterized in different ways, consideration of the structure and purposes of the HSA as a whole would be appropriate to resolve the anomaly. As explained above, no threat to railroad safety is created when employees are required to wait for a deadhead vehicle after a 12-hour period of service, so long as the workers are later afforded an adequate period of off-duty time to rest before they resume their duties. Thus, even assuming that this waiting time could plausibly be characterized as both "time spent in deadhead transportation" and an "interim period available for rest," treatment of the waiting period as neither on- nor off-duty time best effectuates the policies of the Act.

is time on duty." That provision, addressing what is generally referred to as "commingled service," ensures that railroads do not evade the policies of the HSA by (for example) requiring a worker already somewhat fatigued by several hours of office work to continue with a lengthy operating shift.[18] As the FRA has repeatedly emphasized, however, the agency regards the waiting time at issue here as limbo time only if the employee is *not* required to perform any duties for the railroad. See pages 25-26, *infra*. Such waiting periods fall outside the coverage of Section 21103(b)(3), which applies only when an employee is required to "perform[] * * * service for the railroad."

3. Finally, petitioners rely (Pet. Br. 15) on 49 U.S.C. 21103(b)(1) (App., *infra*, 3a), which provides that "[t]ime on duty * * * ends when the employee is finally released from duty." That position is flawed in two respects. First, petitioners' argument presumes that a worker is not "finally released from duty" until the conclusion of deadhead transportation from his "duty assignment" to his "place of final release." 49 U.S.C. 21103(b)(4) (App., *infra*, 3a).[19] The more logical

[18] Although the other paragraphs of 49 U.S.C. 21103(b) (App., *infra*, 2a-4a) were taken more or less directly from 45 U.S.C. 61(b) (1988), the current commingled service provision (paragraph (3)) collapses two provisions of the earlier codification. Former 45 U.S.C. 61(b)(3)(E) (1988) included within the definition of time on duty "[s]uch period of time as is otherwise provided by this chapter." That portion of the definitional section thus incorporated the separate commingled service provision of 45 U.S.C. 62(b) (1988).

[19] See Pet. Br. 15 (relying on Section 21103(b)(1) for the proposition that "time on duty continues until the employee reaches his or her designated terminal").

reading, however, is that the point at which an employee is "finally released from duty" (and his "time on duty" ends) is the point at which he is finally relieved of the responsibility to perform services for the railroad.[20] That point precedes rather than follows the deadhead transportation (including any incidental waiting time) at issue here.[21]

[20] Thus, the 1969 Senate Report states that "time on duty * * * terminates when [the employee] is finally released of all responsibilities." *1969 Senate Report* 8. The FRA's long-standing interpretation is stated in the same way. 49 C.F.R. Pt. 228, App. A. Prior to its recodification in 1994 (see note 1, *supra*), moreover, the HSA provided that "time spent in deadhead transportation by an employee from duty to his point of final release shall not be counted in computing time off duty." 45 U.S.C. 61(b)(3)(C) (1988). That language implied that, absent the proviso, time spent in deadhead transportation from a duty assignment would have been off-duty time.

[21] This interpretation of the Act is supported by the description in the 1969 Senate Report of the situation the deadhead transportation provisions are intended to address. The Senate Report states:

> Many examples were presented in the hearings of employees working up to the 16-hour limitation and then being required or permitted to report for duty after periods of 10 or 8 hours "off duty." The off-duty time, however, well might not be time for rest but could include appreciable time the employee spent in *deadheading back from the place where he was released from time on duty.* The law should be amended so that deadhead time will not be counted as time off duty.

1969 Senate Report 7 (emphasis added). This passage plainly contemplates that "time on duty" ends (and that a person is "released" from duty) prior to the deadhead transportation back from that place. Accord H.R. Rep. No. 469, 91st Cong., 1st Sess. 7 (1969) (*1969 House Report*). Although the Senate Report states that the law should be amended to provide that

Petitioners' argument would be unavailing, moreover, even if their interpretation of Section 21103(b)(1) were the correct one. In arguing that this provision generally covers all time until an employee reaches his or her designated terminal, petitioners themselves recognize that this is so only "unless the Act provides otherwise." Pet. Br. 15.[22] Petitioners also recognize (*id.* at 14) that "time spent in deadhead transportation from a duty assignment" (49 U.S.C. 21103(b)(4) (App., *infra*, 3a)) is limbo time even though (on petitioners' reading of Section 21103(b)(1)) it precedes the time at which an employee is "finally released from duty." Petitioners' reliance on Section 21103(b)(1) therefore begs the question whether time spent waiting for the arrival of the deadhead vehicle is or is not part of "time spent in deadhead transportation." If (as we contend) such waiting time is properly included within "time spent in deadhead transportation," the specific provisions of Section 21103(b)(4) must supersede Section 21103(b)(1)'s general statement that time on duty "ends when the employee is finally released from duty." Cf. *Green* v. *Bock Laundry Machine Co.*, 490 U.S. 504, 524 (1989) ("A general statutory rule usually does not govern unless there is no more specific rule.").

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the deadhead time should no longer be counted as time off duty, it does not suggest any change in the understanding that time *on* duty ends prior to the deadhead time.

[22] In other words, petitioners concede that Section 21103(b)(1) simply identifies the beginning and ending points of the period that potentially qualifies as time on duty, but that the proper characterization of different blocks of time within that period is controlled by the further elaboration of the governing principles in the succeeding paragraphs (2) through (7).

4. As noted above, both the *UTU* litigation and the instant case concern only the treatment of time during which crew members are awaiting the arrival of a deadhead vehicle to take them to their place of final release and have in fact been relieved of *all* duties. The FRA has always taken the position that, if crew members awaiting a deadhead vehicle are obliged to perform any duties for the railroad during that time—including such relatively passive duties as observing passing trains for unsafe conditions, protecting the train they are on from vandalism, or communicating information about the train via radio —they will be considered to be on duty. See Pet. App. 37a-40a (letter of Aug. 4, 1989); J.A. 160 (*Federal Register* notice of Apr. 8, 1993); Pet. App. 31a (letter of Mar. 1, 1995).

As in the courts of appeals, petitioners argue at length that various duties are "typically" imposed upon crew members while they await the arrival of the deadhead vehicle. The record in this case, however, contains no support for that assertion. Petitioners instead rely upon factual materials submitted to the Oregon district court in one of the cases that resulted in the Ninth Circuit's *UTU* ruling. Pet. Br. 6 n.5. Even assuming that such materials are judicially noticeable in the present litigation, they are simply irrelevant to the legal issue at hand. The court of appeals did not purport to determine the proper classification of time during which waiting crew members are called upon to perform additional duties. Pet. App. 11a n.4.[23] Nor need this Court give

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[23] The court acknowledged in passing that time spent by train crew members performing "additional, non-operational, duties" would presumably be counted as time on duty pursuant

any consideration to petitioners' factual allegations, or to any attempt the railroads may make to refute those generalized assertions. The present case concerns the correct treatment of time waiting for a deadhead vehicle where crew members are *not* called upon to perform other services; allegations that crew members *are* required to perform services in particular instances can and should be dealt with in future enforcement proceedings by the FRA if the railroads involved fail to treat those periods as time on duty.

5. In concluding (in *UTU*) that the waiting time at issue here is properly characterized as time on duty, the Ninth Circuit relied in part on the supposed existence of "certain contingent responsibilities" retained by crew members awaiting deadhead transportation. 975 F.2d at 1428. It is less than clear what the court meant by that phrase, but there are at least two possibilities. First, the court might have been responding to (and accepting) the unions' assertions about the duties "typically" imposed upon waiting crew members. If so, the court erred for the reason stated above—*i.e.*, it misconstrued the issue properly before it and assumed the answer to factual inquiries that should have been left to individual enforcement actions. A second possibility is that the Ninth Circuit believed the existence of "contingent responsibilities" to be inherent in the waiting situation, in the sense that employees under the direction and con-

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to the commingled service provision, 49 U.S.C. 21103(b)(3) (App., *infra*, 3a). Pet. App. 11a n.4. Depending upon the type of duty performed, either the commingled service provision or that regarding activities "connected with the movement of a train" (49 U.S.C. 21103(b)(2) (App., *infra*, 3a)) would indeed apply to such time.

trol of the railroad are always subject to the *possibility* of being recalled to duty, to deal (for example) with an arising emergency. If that is what the court meant, then it committed a substantive error that would seriously disrupt the statutory scheme. The possibility of unanticipated emergencies is always present in train operations, and even crew members already moving in the deadhead vehicle *might* be called upon to assist in dealing with such an exigency. The mere possibility of such an event is, we submit, too tenuous a basis to convert what would otherwise be limbo time into time on duty. If particular crew members awaiting or traveling on the deadhead vehicle are actually required to perform services, either to respond to an emergency or otherwise, the time in question is time on duty.[24] But so long as an employee is not obliged to perform any service while awaiting the arrival of a deadhead vehicle, such time should be considered part of deadhead transportation, and hence limbo time.

C. Neither The Implementation Of The HSA Prior To 1969 Nor The Legislative History Of The 1969 Amendments Supports Petitioners' Contention That The Waiting Time At Issue Here Is Time On Duty

Both in the present case and in the earlier *UTU* litigation, petitioners have attempted to invoke the legislative history, and other supposed indications of pre-1969 understandings or practice, in support of

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[24] However, as previously noted (see note 2, *supra*), the statutory limitations on hours of service would not apply in the case of certain emergency situations. See 49 U.S.C. 21102(a) (App., *infra*, 1a-2a).

their position. As noted above (see pages 18-19, *supra*), the 1969 Senate Report's statement that time spent in deadhead transportation to a duty assignment should be "calculated from the time [the employee] reports for duty" (*1969 Senate Report* 8) offers significant support for the FRA's conclusion that waiting time is included within "time spent in deadhead transportation." And several statements by witnesses during the hearings preceding the 1969 amendments appear to reflect the view that time spent waiting for a deadhead vehicle to transport the crew back from its final duty assignment was not time on duty under the HSA as in effect prior to 1969. See *Hours of Service Act Amendments of 1969: Hearings Before the House Comm. on Interstate and Foreign Commerce*, 91st Cong., 1st Sess. 114-115, 178-179 (1969) (*1969 Hearings*). By contrast, the legislative history offers no affirmative support for petitioners' position.

1. Petitioners' reference to the general remedial goals of the original 1907 enactment, and to the intent of Congress in 1969 to deal with "abuses" regarding the treatment of deadheading as time off duty (Pet. Br. 18-19), sheds no light on the interpretive issue presented in this case. Such reliance on the "'broad purposes' of legislation * * * ignores the complexity of the problems Congress is called upon to address and the dynamics of legislative action." *Board of Governors of Federal Reserve System* v. *Dimension Financial Corp.*, 474 U.S. 361, 373-374 (1986). Even if the 1969 HSA amendments can be said to reflect a generalized congressional intent to "close loopholes" and make the Act's protections stronger (Pet. Br. 16, 20), Members of Congress "may differ sharply on the means for effectuating that intent, [and] the final

language of the legislation may reflect hard-fought compromises." *Dimension Financial*, 474 U.S. at 374. In the case of the 1969 amendments, legislative compromise clearly took place between introduction of a bill that would have treated *all* deadheading as time on duty,[25] and final enactment of the provision distinguishing between deadheading to and from duty, with the latter treated as limbo time. See *1969 House Report* 7-8 (quoted at note 5, *supra*).

2. Petitioners' reliance on two snippets from the lengthy hearings held in 1969 is also misplaced. Even if the statements at issue provided reliable indicia of congressional intent, they would furnish no support for petitioners' position in the instant case. In the initial passage (see Pet. Br. 19-20), a railway labor representative discussed an egregious example of the consequences of treating deadheading as *off-duty* time, noting that a crew had been required to work a second shift following an off-duty period that consisted chiefly of an opportunity for "rest" in a caboose. See *1969 Hearings* 30. In the second passage (see Pet. Br. 20-21), a railroad representative discussed the anticipated deleterious effects of treating deadhead transportation from a duty assignment as time *on duty*, as the bill then under consideration would have done. See *1969 Hearings* 134-135; note 25, *supra*. Congress's ultimate decision to treat such deadheading time as neither on- nor off-duty time avoided both of the dangers to which those witnesses referred. Moreover, the testimony upon which peti-

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[25] See H.R. 8449, 91st Cong., 1st Sess., § 1 (1969), *reprinted in 1969 Hearings* 2 (amending Section 61(b)(3)(C) to provide that "[t]ime spent in deadhead transportation by an employee to or from duty assignment" shall be included in on-duty time).

tioners rely did not address (or have logical implications for) the question whether time spent waiting for a deadhead vehicle is properly regarded as time spent in deadhead transportation.

3. The Ninth Circuit in *UTU* believed that, "[a]t the time of the 1969 amendments to the HSA, it was clear that time spent waiting for the arrival of deadhead transportation bearing a relief crew was 'time on duty' under the statute." 975 F.2d at 1426-1427. That court treated as pivotal the purported lack of congressional intent to "change the established rule regarding the treatment of waiting time." *Id.* at 1427; see Pet. Br. 21-22. The Seventh Circuit in the present case, by contrast, accepted the railroads' contention that Congress in 1969 had reason to know that "this waiting time was never treated as on-duty time." Pet. App. 13a.

In our view, such considerations fail to add appreciable support to either side of the debate. Although Congress is presumed to be aware of judicial or administrative interpretations of existing laws, see, *e.g.*, *Fogerty* v. *Fantasy, Inc.*, 114 S. Ct. 1023, 1030 (1994), Congress cannot be said to have acted against the backdrop of a "settled construction" of the HSA in 1969, see *id.* at 1032-1033. In only one reported decision prior to 1969 did a court address the treatment of time waiting for deadhead transportation at the end of the crew members' duty; at the urging of the Interstate Commerce Commission, which preceded the FRA as the agency charged with enforcement of the HSA, a district court held the particular waiting period that was the subject of the enforcement action to be time on duty. See *United States* v. *Pennsylvania R.R.*, 275 F. Supp. 345 (W.D. Pa. 1967). That decision, moreover, can be read to turn on its particular facts without stating a categorical legal rule (see *id.* at 348-349; cf. J.A. 62-63 (1977 FRA description of *Pennsylvania Railroad* case)), and it was not cited in the legislative history of the 1969 amendments. In any event, it is clear that Congress intended in 1969 to alter the governing statutory framework, by replacing the implicit dichotomy between on-duty and off-duty time with an express tripartite scheme. Judicial and administrative practice during an era when limbo time did not exist can be of little assistance in determining the proper contours of that category of time. There is consequently no basis for believing either that Congress understood there to be a clearly established rule treating time spent waiting for the deadhead vehicle at the conclusion of a duty assignment as time on duty, or that Congress intended to perpetuate such a rule.[26]

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[26] The FRA has taken the position that *Pennsylvania Railroad* was correctly decided under the pre-1969 statutory scheme, but that it cannot control the interpretation of the HSA in its current form. Prior to 1969, the HSA made no provision for limbo time; all time was either on duty or off duty. As a consequence, a lengthy period spent waiting for a deadhead vehicle (*i.e.*, ten hours or more) would have counted as the full amount of required time off duty, and would thus have allowed the railroad to put the crew back into service. Treating waiting time as time on duty would have guarded against such a result under the pre-1969 Act, but the same protection is now afforded simply by treating such waiting periods as limbo time.

None of the other decisions upon which petitioners rely (see Pet. Br. 25-27) involved time spent awaiting the arrival of a deadhead vehicle. The waiting time at issue in *Missouri, K. & T. Ry.* v. *United States*, 231 U.S. 112 (1913), occurred while the "engine was sent off for water and repairs." *Id.* at 119. It is

D. To The Extent That The Court Finds The HSA Ambiguous, It Should Adopt The FRA's Reasonable Interpretation And Reject Petitioners' Invitation To Expand The Act's Coverage Based On Policy Considerations

This Court has "long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer." *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984).[27] Petitioners err in asserting (Pet. Br. 23) that the FRA's views deserve no weight on the

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apparent that the crew was expected to resume duties following the waiting period at issue—a situation that the FRA would clearly consider to be time on duty today. See 49 U.S.C. 21103(b)(4) and (5) (App., *infra*, 3a). *United States* v. *Southern Pacific Co.*, 245 F. 722 (9th Cir. 1917), and *Northern Pacific Ry.* v. *United States*, 220 F. 108 (9th Cir. 1915), both addressed the question whether short interim periods of inactivity were sufficient to break the continuity of the employees' service. In *San Pedro, L.A. & S.L.R.R.* v. *United States*, 213 F. 326 (8th Cir. 1914), all the crew members except the fireman were relieved of all responsibilities when the train was tied up short of its destination; the fireman was required to watch the engine and to keep it in operation until the relief crew arrived. *Id.* at 327. The fireman, but not the rest of the crew, was considered to be on duty during that period. Exactly the same result would be reached under the FRA's interpretation of the present version of the HSA.

[27] Congress amended the Hours of Service Act on five separate occasions between 1969 and 1992 (in 1976, 1978, 1980, 1988, and 1992), the year in which the Ninth Circuit issued its decision in *UTU* and the FRA changed its interpretation of the pertinent statutory provision. Congress never took action, however, to direct a different treatment of time spent waiting for the deadhead vehicle.

ground that the agency has "waffled" in its approach to the interpretive issue now before the Court.[28] In fact, as the concurring judges in the court below recognized, there has been consistent logic to the FRA's approach. See Pet. App. 17a-18a. The agency has never regarded the unions' position on the issue at hand as the more persuasive reading of the pertinent statutory language; rather, it attempted to acquiesce in the Ninth Circuit's ruling chiefly because of the high value it ascribed to nationwide uniformity. *Ibid.*; see *id.* at 30a (letter of Mar. 1, 1995, explaining reasons for earlier position).[29] After the Seventh Circuit's ruling in this case, however, the FRA recognized that it was powerless to effect such uniformity in the absence of action by this Court or Congress. The agency therefore reverted to the po-

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[28] Petitioners' other arguments attacking the FRA's "credibility" are even more impertinent to the matter at hand. The miscellaneous criticisms leveled at the FRA by other government agencies and by journalists (Pet. Br. 24 & n.8) all appear to involve specific incidents or issues that have nothing to do with the FRA's reliability in construing the HSA. Petitioners also go far afield in relying on affidavits, filed in other litigation, by *former* FRA employees offering their views on how the HSA was or should be interpreted (*id.* at 23). The fact that individual employees may have construed a statutory provision in a different manner does not detract from the agency's proper interpretive role.

[29] Nationally uniform application of safety laws is especially important in the railroad industry. Many railroads have operations in several different circuits. In fact, a single train may travel across circuit boundaries, thus creating a situation where the applicable law changes as the train moves. To avoid such situations, Congress has indicated its clear intention that railroad safety laws be "nationally uniform to the extent practicable." 49 U.S.C. 20106.

sition that it had consistently espoused prior to the Ninth Circuit's 1992 ruling—*i.e.*, that time spent waiting for a deadhead vehicle at the conclusion of a duty assignment is most reasonably regarded as "part and parcel" of "time spent in deadhead transportation," and therefore as limbo time. See *id.* at 30a-31a. The FRA's efforts to adapt its policies to a changing legal landscape hardly constitute the sort of unexplained inconsistency that might render judicial deference unwarranted. The agency's current approach—which the court below believed to be mandated by the text of the Act—is surely well within the range of "permissible" statutory constructions that should be upheld when embraced by the agency charged with enforcement of the HSA. See *Chevron*, 467 U.S. at 843-845.

Petitioners also point out that the HSA does not permit the FRA to exercise legislative rulemaking authority—*i.e.*, the sort of authority that would enable it to impose on the railroads substantive requirements beyond those expressly established by the Act itself. See Pet. Br. 24.[30] There is considerable

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[30] The FRA has consistently acknowledged that it lacks substantive rulemaking authority over hours of service issues, and that its statements regarding the proper classification of time awaiting the deadhead vehicle are interpretive rules. See, *e.g.*, J.A. 159. The court below took note of that fact, opining that the interpretive nature of the actions at issue affected the *degree* of deference it was willing to afford. Pet. App. 8a-9a; see also *Wagner Seed Co.* v. *Bush*, 946 F.2d 918, 922 (D.C. Cir. 1991) (interpretive rules accorded deference under *Chevron*), cert. denied, 503 U.S. 970 (1992); accord *Kennedy* v. *Shalala*, 995 F.2d 28, 30 n.3 (4th Cir. 1993); *American Land Title Ass'n* v. *Clarke*, 968 F.2d 150, 154 (2d Cir. 1992), cert. denied, 113 S. Ct. 2959 (1993).

irony in that observation, in light of petitioners' extensive arguments elsewhere that *this Court* should base its ruling on an open-ended assessment of public safety concerns. See *id.* at 29-37. Thus, petitioners discuss a number of governmental and academic studies—most of which are not in the record of the present litigation—dealing with general issues of worker fatigue, particularly issues concerning the possible long-term effects of irregular work schedules. *Ibid.*

The HSA contains no provision, however, governing the regularity of train crew hours, and the FRA has previously explained that its lack of substantive rulemaking authority precludes it from going beyond the terms of the HSA to address even arguably related work-hours issues. See Pet. App. 41a. The agency has recognized, to be sure, that particularly long delays awaiting the arrival of a deadhead vehicle may contribute to an employee's cumulative fatigue, see *id.* at 32a-33a, but long periods spent in the deadhead vehicle itself may produce the same sort of fatigue, and petitioners concede that such periods are nevertheless excluded from time on duty. In any event, such considerations cannot support an interpretation of the HSA's terms contrary to that dictated by traditional principles of statutory construction. Petitioners have presented no sound basis for this Court to depart from the terms of the Act and the FRA's reasonable interpretation of it in order to advance related but distinct policy goals that Congress has not seen fit to address. Petitioners' assertions regarding irregular work schedules and cumulative fatigue may raise important safety issues

worthy of public debate,[31] but they have no bearing on the question of statutory interpretation presented by this case.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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[31] Among the materials cited by petitioners in this regard are instances of testimony presented to congressional committees. Pet. Br. 33-34. That, we submit, is precisely where such presentations belong—before the body that has the authority to address such public safety concerns. As noted above, moreover, lengthy rides in a deadhead vehicle may create the same disruption of employee work schedules, yet Congress has consistently declined to limit the duration of such journeys.

APPENDIX

CHAPTER 211—HOURS OF SERVICE

§ 21101. Definitions

In this chapter—

(1) "designated terminal" means the home or away-from-home terminal for the assignment of a particular crew.

(2) "dispatching service employee" means an operator, train dispatcher, or other train employee who by the use of an electrical or mechanical device dispatches, reports, transmits, receives, or delivers orders related to or affecting train movements.

(3) "employee" means a dispatching service employee, a signal employee, or a train employee.

(4) "signal employee" means an individual employed by a railroad carrier who is engaged in installing, repairing, or maintaining signal systems.

(5) "train employee" means an individual engaged in or connected with the movement of a train, including a hostler.

§ 21102. Nonapplication and exemption

(a) GENERAL.—This chapter does not apply to a situation involving any of the following:

(1) a casualty.

(2) an unavoidable accident.

(3) an act of God.

(4) a delay resulting from a cause unknown and unforeseeable to a railroad carrier or its officer or agent in charge of the employee when the employee left a terminal.

(b) EXEMPTION.—The Secretary of Transportation may exempt a railroad carrier having not more than 15 employees covered by this chapter from the limitations imposed by this chapter. The Secretary may allow the exemption after a full hearing, for good cause shown, and on deciding that the exemption is in the public interest and will not affect safety adversely. The exemption shall be for a specific period of time and is subject to review at least annually. The exemption may not authorize a carrier to require or allow its employees to be on duty more than a total of 16 hours in a 24-hour period.

§ 21103. Limitations on duty hours of train employees

(a) GENERAL.—Except as provided in subsection (c) of this section, a railroad carrier and its officers and agents may not require or allow a train employee to remain or go on duty—

(1) unless that employee has had at least 8 consecutive hours off duty during the prior 24 hours; or

(2) after that employee has been on duty for 12 consecutive hours, until that employee has had at least 10 consecutive hours off duty.

(b) DETERMINING TIME ON DUTY.—In determining under subsection (a) of this section the time a train employee is on or off duty, the following rules apply:

(1) Time on duty begins when the employee reports for duty and ends when the employee is finally released from duty.

(2) Time the employee is engaged in or connected with the movement of a train is time on duty.

(3) Time spent performing any other service for the railroad carrier during a 24-hour period in which the employee is engaged in or connected with the movement of a train is time on duty.

(4) Time spent in deadhead transportation to a duty assignment is time on duty, but time spent in deadhead transportation from a duty assignment to the place of final release is neither time on duty nor time off duty.

(5) An interim period available for rest at a place other than a designated terminal is time on duty.

(6) An interim period available for less than 4 hours rest at a designated terminal is time on duty.

(7) An interim period available for at least 4 hours rest at a place with suitable facilities for food and lodging is not time on duty when the employee is prevented from getting to the employee's designated terminal by any of the following:

(A) a casualty.

(B) a track obstruction.

(C) an act of God.

(D) a derailment or major equipment failure resulting from a cause that was unknown and unforeseeable to the railroad carrier or its officer or agent in charge of that employee when that employee left the designated terminal.

(c) EMERGENCIES.—A train employee on the crew of a wreck or relief train may be allowed to remain or go on duty for not more than 4 additional hours in any period of 24 consecutive hours when an emergency exists and the work of the crew is related to the emergency. In this subsection, an emergency ends when the track is cleared and the railroad line is open for traffic.

§ 21104. Limitations on duty hours of signal employees

(a) GENERAL.—(1) In paragraph (2)(C) of this subsection, "24-hour period" means the period beginning when a signal employee reports for duty immediately after 8 consecutive hours off duty or, when required under paragraph (2)(B) of this subsection, after 10 consecutive hours off duty.

(2) Except as provided in subsection (c) of this section, a railroad carrier and its officers and agents may not require or allow a signal employee to remain or go on duty—

(A) unless that employee has had at least 8 consecutive hours off duty during the prior 24 hours;

(B) after that employee has been on duty for 12 consecutive hours, until that employee has had at least 10 consecutive hours off duty; or

(C) after that employee has been on duty a total of 12 hours during a 24-hour period, or after the end of that 24-hour period, whichever occurs first, until that employee has had at least 8 consecutive hours off duty.

(b) DETERMINING TIME ON DUTY.—In determining under subsection (a) of this section the time a signal employee is on duty or off duty, the following rules apply:

(1) Time on duty begins when the employee reports for duty and ends when the employee is finally released from duty.

(2) Time spent performing any other service for the railroad carrier during a 24-hour period in which the employee is engaged in installing, repairing, or maintaining signal systems is time on duty.

(3) Time spent returning from a trouble call, whether the employee goes directly to the employee's residence or by way of the employee's headquarters, is neither time on duty nor time off duty, except that up to one hour of that time spent returning from the final trouble call of a period of continuous or broken service is time off duty.

(4) If, at the end of scheduled duty hours, an employee has not completed the trip from the final outlying worksite of the duty period to the employee's headquarters or directly to the employee's residence, the time after the scheduled duty hours necessarily spent in completing the trip to the residence or headquarters is neither time on duty nor time off duty.

(5) If an employee is released from duty at an outlying worksite before the end of the employee's scheduled duty hours to comply with this section, the time necessary for the trip from the worksite to the employee's headquarters or directly to the employee's residence is neither time on duty nor time off duty.

(6) Time spent in transportation on an ontrack vehicle, including time referred to in paragraphs (3)-(5) of this subsection, is time on duty.

(7) A regularly scheduled meal period or another release period of at least 30 minutes but not more than one hour is time off duty and does not break the continuity of service of the employee under this section, but a release period of more than one hour is time off duty and does break the continuity of service.

(c) EMERGENCIES.—A signal employee may be allowed to remain or go on duty for not more than 4 additional hours in any period of 24 consecutive hours when an emergency exists and the work of that employee is related to the emergency. In this subsection, an emergency ends when the signal system is restored to service.

§ 21105. Limitations on duty hours of dispatching service employees

(a) APPLICATION.—This section applies, rather than section 21103 or 21104 of this title, to a train employee or signal employee during any period of time the employee is performing duties of a dispatching service employee.

(b) GENERAL.—Except as provided in subsection (d) of this section, a dispatching service employee may not be required or allowed to remain or go on duty for more than—

(1) a total of 9 hours during a 24-hour period in a tower, office, station, or place at which at least 2 shifts are employed; or

(2) a total of 12 hours during a 24-hour period in a tower, office, station, or place at which only one shift is employed.

(c) DETERMINING TIME ON DUTY.—Under subsection (b) of this section, time spent performing any other service for the railroad carrier during a 24-hour period in which the employee is on duty in a tower, office, station, or other place is time on duty in that tower, office, station, or place.

(d) EMERGENCIES.—When an emergency ex-ists, a dispatching service employee may be allowed to remain or go on duty for not more than 4 additional hours during a period of 24 consecutive hours for not more than 3 days during a period of 7 consecutive days.

§ 21106. Limitations on employee sleeping quarters

A railroad carrier and its officers and agents—

(1) may provide sleeping quarters (including crew quarters, camp or bunk cars, and trailers) for employees, and any individuals employed to maintain the right of way of a railroad carrier, only if the sleeping quarters are clean, safe, and sanitary and give those employees and individuals an opportunity for rest free from the interruptions caused by noise under the control of the carrier; and

(2) may not begin, after July 7, 1976, construction or reconstruction of sleeping quarters referred to in clause (1) of this section in an area or in the immediate vicinity of an area, as determined under regulations prescribed by the Secretary of Transportation, in which railroad switching or humping operations are performed.

§ 21107. Maximum duty hours and subjects of collective bargaining

The number of hours established by this chapter that an employee may be required or allowed to be on duty is the maximum number of hours consistent with safety. Shorter hours of service and time on duty of an employee are proper subjects for collective bargaining between a railroad carrier and its employees.

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CHAPTER 213—PENALTIES

SUBCHAPTER I—CIVIL PENALTIES

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§ 21303. Chapter 211 violations

(a) PENALTY.—(1) Subject to section 21304 of this title, a person violating chapter 211 of this title is liable to the United States Government for a civil penalty. An act by an individual that causes a railroad carrier to be in violation is a violation. For a violation of section 21106 of this title, a separate violation occurs for each day a facility is not in compliance.

(2) The Secretary of Transportation imposes a civil penalty under this subsection. The amount of the penalty shall be at least $500 but not more than $10,000. However, when a grossly negligent violation or a pattern of repeated violations has caused an imminent hazard of death or injury to individuals, or has caused death or injury, the amount may be not more than $20,000.

(3) The Secretary may compromise the amount of the civil penalty under section 3711 of title 31. In determining the amount of a compromise, the Secretary shall consider—

(A) the nature, circumstances, extent, and gravity of the violation;

(B) with respect to the violator, the degree of culpability, any history of violations, the ability to pay, and any effect on the ability to continue to do business; and

(C) other matters that justice requires.

(4) If the Secretary does not compromise the amount of the civil penalty, the Secretary shall refer the matter to the Attorney General for collection.

(b) CIVIL ACTIONS TO COLLECT.—(1) The Attorney General shall bring a civil action in a district court of the United States to collect a civil penalty that is referred to the Attorney General for collection under subsection (a) of this section after satisfactory information is presented to the Attorney General. The action may be brought in the judicial district in which the violation occurred or the defendant has its principal executive office. If the action is against an

individual, the action also may be brought in the judicial district in which the individual resides.

(2) A civil action under this subsection must be brought not later than 2 years after the date of the violation unless administrative notification under section 3711 of title 31 is given within that 2-year period to the person committing the violation. However, even if notification is given, the action must be brought within the period specified in section 2462 of title 28.

(c) IMPUTATION OF KNOWLEDGE.—In any proceeding under this section, a railroad carrier is deemed to know the acts of its officers and agents.